FILE COPY

Office - Supreme Court, U. S
FILED
OCT 11 1937
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

No. 777, October Term, 1936.
No. 9, October Term, 1937.

NOLEN R. BREEDLOVE,
APPELLANT,

vs.

T. EARL SUTTLES, Tax Collector,
APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA.

BRIEF OF APPELLEE ON MOTION TO DISMISS.

CHAS. B. SHELTON,
RALPH H. PHARR,
E. HAROLD SHEATS,
W. S. NORTHCUTT,
Attorneys at Law for Appellee.

504 First Nat'l Bank Bldg.,
Atlanta, Georgia.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Introduction	1
I. Where the writ of mandamus would be nugatory or unavailing, it should be denied	3
II. Conviction of a crime involving moral turpitude constitutionally disqualified one to vote in Georgia	3
III. Forgery is a crime involving moral turpitude	4
IV. An original motion to dismiss may be entertained for matter arising subsequently to the appeal where appropriate	5
Conclusion	6

Cases Cited.

Holloway v. Holloway, 126 Ga. 459, 460, 55 S. E. 191, 7 L. R. A. (N. S.) 272, 115 Am. St. Rep. 102, 7 Ann. Cas. 1164	4
Hughes v. State Board of Examiners, 162 Ga. 246, 255, 134 S. E. 42, 46	4
Johnston v. Riley, 13 Ga., p. 97, Opinion, page 131	4
Mills v. Green, 159 U. S. 651, 40 L. ed. 293	3
Richardson v. McChesney, 218 U. S. 487, 54 L. ed. 1121	3
Seaboard Air Line Railway Co. v. Watson, 267 U. S. 86, 77 L. ed. 180	2
Skrmetta v. Coykendall (D. C. U. S., Northern District Georgia), 16 F. (2d) 783	4
Smith, Treasurer, v. Hodgson et al., 129 Ga. 494 (2)	6
United States of America ex rel. John Munsill Ulrich v. Kellogg, Secretary of State, 58 App. D. C. 360, 30 F. (2d) 984, 71 A. L. R. 1210, writ of certiorari denied 279 U. S. 868, 73 L. ed. 1005, 49 S. Ct. 482, rehearing denied 73 L. ed. 1005, 50 S. Ct. 79	4
United States v. Fisher, 222 U. S. 204, 32 S. Ct. 37, 56 L. ed. 165	6

Miscellaneous Cited.

5 American & English Annotated Cases, p. 626	6
3 American Jurisprudence, Sec. 737, p. 314	5
Code (1882), Sec. 5033	4
Code (1896), Sec. 3736	4
Code (1911), Sec. 6404	4
Code (1933), Sec. 2-701	4
41 C. J., p. 212	4
4 C. J., Sec. 1362 (b), 1377 (3), p. 1971	5
38 C. J., Sec. 23, p. 551	3
38 C. J., Sec. 755, p. 951	5
Constitution of 1877, Art. II, Sec. 2	3
Michie's Code (1926), Sec. 6404	4
Park's Code (1914), Sec. 6404	4

SUPREME COURT OF THE UNITED STATES.

No. 777, October Term, 1936.
No. 9, October Term, 1937.

NOLEN R. BREEDLOVE,
APPELLANT,

vs.

T. EARL SUTTLES, Tax Collector,
APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA.

BRIEF OF APPELLEE ON MOTION TO DISMISS.

Now comes T. Earl Suttles, in his capacity as Tax Collector of Fulton County, Georgia, the appellee in the above case, and respectfully files this his brief in support of motion to dismiss the appeal heretofore filed therein, and alleges:

Introduction.

The motion to affirm is based upon the ground that the questions upon which the decision of the cause depends are

so unsubstantial as to require no further argument. Rule 7, paragraph 4 of the Rules of this Honorable Court.

The motion to dismiss is based in part upon the ground that no substantial federal question is presented, and in part upon the ground that the question in controversy has become moot.

Want of a substanial federal question is cause for dismissal of an appeal to this Court.

> Seaboard Air Line Railway Co. v. Watson, 267 U. S. 86, 77 L. ed. 180.

In the main brief filed in this court, appellee has attempted to make a thorough analysis of the facts and of the law which is controlling on a consideration of this motion. Every question referred to by appellant or sought to be raised based upon the Constitution of the United States has been repeatedly decided adversely to appellant, with the possible exception of the question based upon an alleged right arising under the Nineteenth Amendment.

Decisions of this Court directly in point on all other clauses of the Federal Constitution are cited in the corresponding sections of the main brief.

Several well-considered state decisions and decisions of the Supreme Court of the United States upon similar clauses of the Constitution are cited as controlling on the issue of the Nineteenth Amendment in sections IX, XI and XII of the main brief.

An analysis of the constitutional attack based upon the Nineteenth Amendment is contained in division VIII of the main brief.

Only unusual questions raised in the motion to dismiss or to affirm will be given special consideration.

I.

"Where the writ of mandamus would be nugatory or unavailing it should be denied."

The above title of this section is taken from mandamus section 23, 38 C. J., page 551.

It is the general rule in election cases that where mandamus is sought for the purpose of enabling one to vote at an election, the relief will not be granted if the date of the election is passed.

Richardson v. McChesney, 218 U. S. 487, 54 L. ed. 1121;
Mills v. Green, 159 U. S. 651, 40 L. ed. 293.

If the facts set forth in the verified motion are true, even if mandamus should be granted, appellant would thereafter be disqualified to vote in any future election in Georgia, and the writ, if granted, would be unavailing.

II.

Conviction of a crime involving moral turpitude constitutionally disqualifies one to vote in Georgia.

The constitutional requirements of the present Constitution of 1877 regarding disfranchisement of voters by reason of conviction of crime involving moral turpitude and for other causes are embraced in Article II, Section 2 of the Constitution of 1877 as follows:

> "The General Assembly may provide, from time to time, for the registration of all electors, but the following classes of persons shall not be permitted to register, vote, or hold any office, or appointment of honor or trust in this State, to-wit:

"(1) Those who shall have been convicted, in any Court of competent jurisdiction, of treason against the State, of embezzlement of public funds, malfeasance in office, bribery, or larceny, or of any crime involving moral turpitude, punishable by the laws of this State with imprisonment in the penitentiary, unless such person shall have been pardoned;

"(2) Idiots and Insane Persons."

Code (1882), Section 5033;
Code (1896), Section 3736;
Code (1911), Section 6404;
Park's Code (1914), Section 6404;
Michie's Code (1926), Section 6404;
Code of 1933, Section 2-701.

III.

Forgery is a crime involving moral turpitude.

Johnston v. Riley, 13 Ga., p. 97, *opinion, page 131;*
United States of America ex rel. John Munsill Ulrich v. Kellogg, Secretary of State, 58 App. D. C. 360, 30 F. (2d) 984, 71 A. L. R. 1210, writ of certiorari denied 279 U. S. 868, 73 L. ed. 1005, 49 S. Ct. 482, rehearing denied 73 L. ed. 1005, 50 S. Ct. 79.

In the case cited, the convictions in question were: Larceny, three cases, and abetting a forgery, one case.

Skrmetta v. Coykendall (D. C. U. S., Northern District Georgia), 16 F. (2d) 783;
Hughes v. State Board of Examiners, 162 Ga. 246, 255, 134 S. E. 42, 46;
Holloway v. Holloway, 126 Ga. 459, 460, 55 S. E. 191, 7 L. R. A. (N. S.) 272, 115 Am. St. Rep. 102, 7 Ann. Cas. 1164;
See Definition of "Moral Turpitude," 41 C. J., p. 212.

IV.

An original motion to dismiss may be entertained for matter arising subsequently to the appeal where appropriate.

As set forth in the motion, the conviction disclosed by the certified documents attached did not become final until after jurisdiction had been conditionally noted in this court, reserving until the hearing a consideration of whether or not a substantial federal question was presented.

The prayer incorporated in the motion includes the relief authorized by Section 1 of Rule 15 of the Rules of this Honorable Court, although the Court has jurisdiction to require an appropriate response to this motion or discovery by the appellant which would probably make the issuance of a Commission unnecessary.

"Where the controversy is determined by an order in the same or another action or proceeding, the appeal may be dismissed."

Appeal and Error, Section 1362 (b), 4 C. J. S., p. 1971.

This rule is particularly applicable to mandamus proceedings, where events occurring subsequent to the appeal, even in a proper case, render the writ unavailing.

Mandamus, Section 755, 38 C. J., p. 951.

Where the facts which are material for consideration occurred subsequent to the appeal, evidence dehors the record may and should be received.

Appeal and Error, Sec. 1377 (3), 4 C. J. S., page 2000, and authorities cited, notes 92 and 93.

This rule is particularly appropriate to mandamus proceedings.

Appeal and Error, Section 737, 3 American Jurisprudence, page 314.

See exhaustive case note on the question, "Dismissal of Appeal in Mandamus Proceedings where question involved has become immaterial."

5 American & English Annotated Cases, page 626.

Conclusion.

"Mandamus is not a writ of right. It issues to remedy a wrong, not to promote one, and will not be granted in aid of those who do not come into court with clean hands."

United States v. Fisher, 222 U. S. 204, 32 S. Ct. 37, 56 L. ed. 165.

This is also the law of the State of Georgia.

Smith, Treasurer, v. Hodgson et al., 129 Ga. 494 (2).

Under the circumstances disclosed by this motion, appellee respectfully requests that this Honorable Court decline to accept jurisdiction in the case; that such order as the Court may deem appropriate be passed to discover the truth of any averment in the motion which may not be admitted by the appellant, and that the Court inquire into the matters disclosed by the motion before entering upon a hearing of the merits of the application.

Respectfully submitted,

CHARLES B. SHELTON,
504 First National Bank Bldg.,
RALPH H. PHARR,
504 First National Bank Bldg.,
E. HAROLD SHEATS,
219 Hurt Bldg.,
W. S. NORTHCUTT,
504 First National Bank Bldg.,
Attorneys for T. Earl Suttles in his capacity as Tax Collector of Fulton County, Georgia, Appellee.

Atlanta, Georgia.
October 2, 1937.